A **7-ELEVEN MALAYSIA SDN BHD v. ASHVINE HARI KRISHNAN**

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
ABU BAKAR JAIS JCA
S NANTHA BALAN JCA
B [CIVIL APPEAL NO: W-02(IM)(NCVC)-629-04-2022]
14 MARCH 2023

Abstract – *If a claim is one for compensation for wrongful dismissal (loss of employment), then it is a claim which ought to be ventilated via the statutory dispute mechanism provided for in the Industrial Relations Act 1967 ('Act'), ie, the Industrial Court, and not the civil court. It is an abuse of process of the court for an employee who claims that he/she had been dismissed without just cause or excuse to file a common law action to claim for damages, instead of pursuing the remedies available under the Act.*

TORT: *Damages – Claim for – Employee claimed against employer for negligence and torts of emotional distress, harassment and bullying – Whether allegations of torts simply 'building blocks' for complaint of constructive dismissal – Whether established – Whether abuse of process of court for employee to file common law action at civil court – Whether employee ought to have gone to Industrial Court – Whether employee ought to have pursued statutory dispute resolution mechanism/process to obtain remedies under Industrial Relations Act 1967*

CIVIL PROCEDURE: *Striking out – Writ of summons and statement of claim – High Court claim – Appeal against – Employee claimed against employer for negligence and torts of emotional distress, harassment and bullying – Application by employer to strike out writ of summons and statement of claim – Whether essentially claim for constructive dismissal – Whether High Court lacked requisite jurisdiction to hear and determine claim – Whether ought to have been pursued via s. 20 of Industrial Relations Act 1967 – Whether claim abuse of process – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)*

This was an appeal by the appellant ('defendant') against the decision of the High Court Judge ('HCJ') dismissing the defendant's application ('encl. 9') for an order that the respondent's ('plaintiff') writ of summons and statement of claim be struck out and dismissed. The plaintiff was employed by the defendant as its Senior Manager of Human Resources. Problem erupted when the plaintiff was instructed to report to one Liew Kian Meng ('Liew'), who was the General Manager of Human Resources for the defendant. Liew had raised some concerns about the plaintiff's performance on several occasions. The plaintiff alleged that the appraisal was inherently unfair and that she was being bullied and harassed by Liew. This culminated into the plaintiff resigning, which was accepted by the defendant. The resignation letter made

reference to certain allegations which were directed at Liew. The plaintiff then commenced a claim against the defendant in the High Court and claimed for: (i) RM6,032,956.40 as damages for alleged breach of the employment contract, representing the alleged employment benefits of the plaintiff for 20 years; (ii) RM10 million as damages for constructive dismissal; (iii) RM10 million as damages for the tort of intentionally causing emotional distress; (iv) RM10 million as damages for torts of harassment and bullying; (v) RM10 million as damages for negligence in appointing, retaining and monitoring the recruitment of employees; (vi) general damages; and (vii) RM50 million as exemplary damages. The defendant filed encl. 9, under O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of Court 2012, contending that the High Court lacked the requisite jurisdiction to hear and determine the plaintiff's claim, which was essentially a claim for constructive dismissal, which ought to have been pursued *via* s. 20 of the Industrial Relations Act 1967 ('Act'). The defendant also took the position that Suit 694 was an abuse of process. The HCJ disagreed with the defendant and dismissed encl. 9. The HCJ opined that the plaintiff's claim was essentially a claim for 'constructive dismissal' and whilst the plaintiff was entitled to pursue a claim for dismissal without just cause or excuse in the Industrial Court, the High Court nevertheless had jurisdiction to deal with and determine the claim as presented in Suit 694 and the Act did not oust the High Court's jurisdiction. Hence, the present appeal.

Held (allowing appeal)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) The plaintiff's claim was for constructive dismissal. Regardless of whether an employee had been dismissed by the employer (direct dismissal) or whether the employee left the employment, walked out of the workplace or was forced or compelled or put in a situation where he/she had to resign (indirect dismissal/constructive dismissal), the position under the Malaysian industrial jurisprudence is that an employee who finds himself in such a situation is legally entitled to have recourse to the statutory dispute resolution mechanism per s. 20 of the Act and may seek reinstatement and monetary compensation as a result of having been dismissed without just cause or excuse. (paras 28 & 30)

(2) The so-called tort of emotional distress was unmaintainable. The allegation of negligence was in regard to the defendant's decision to appoint Liew as the General Manager of Human Resources. The plaintiff was of the view that the defendant was reckless in appointing Liew. However, it could not be seen how this translated into a cause of action in favour of the plaintiff in the circumstances where it had not been demonstrated that the defendant owed a duty of care to the plaintiff in the appointment of their employees. Of course, an employer's failure to appoint competent co-workers *etc* may perhaps be relevant to an injury-at-work type situation but this was not such a case. Here was a

A case, plain and simple, where the plaintiff could not accept Liew's appraisal of her performance and where she also alleged that he bullied and harassed her. The so-called tort of harassment and bullying were, at best, 'building blocks' for a complaint of constructive dismissal. (paras 39 & 40)

B **(3)** The Industrial Court is a creature of the Act which is, in turn, a piece of social legislation, enacted as a speedy form of statutory remedy to resolve industrial disputes between employers and employees and trade unions. Having regard to the purpose for which the Act was enacted, it was wholly incumbent upon the plaintiff, who complained that she had C been constructively dismissed, to invoke the statutory remedy under the Act, instead of filing a civil action and claiming substantial damages of the type as stated in the statement of claim. The type of damages which were stated in the statement of claim could not be awarded by the Industrial Court. The Industrial Court would only make an award as D permitted by the Act – reinstatement or salary *in lieu* of reinstatement with back wages. What the Industrial Court would award is compensation for loss of employment and that was what the plaintiff would be entitled to, if at all. Whilst an employee may file a common law claim in the civil court, such a claim is confined, as a matter of law, E to 'meagre' damages in the form of salary *in lieu* of notice. (paras 44-46)

(4) The plaintiff's claim per Suit 694 was a clear manifestation of an abuse of process. The decision of the High Court dismissing encl. 9 was set aside. Enclosure 9 was allowed and the plaintiff's writ and statement of F claim were struck out and dismissed. (paras 68 & 70)

Case(s) referred to:

AETNA Universal Insurance Sdn Bhd v. Ooi Meng Sua [2001] 3 CLJ 1 CA ***(refd)***

Alan Thomas Bohlsen v. Draftworldwide Sdn Bhd [2009] 1 LNS 550 HC ***(refd)***

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1980] 1 LNS 156 FC ***(refd)***

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Holiday Inn Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC ***(refd)***

Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon [2023] 2 CLJ 34 CA ***(refd)***

Ng Kim Fong v. Menang Corporation (M) Bhd [2020] 1 LNS 1263 CA ***(refd)***

Ng Siang Teik v. Chow Tat Ming & Ors [2010] 1 LNS 1778 HC ***(refd)***

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Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat [2021] 6 CLJ 700 CA ***(refd)***

V Sinnathamboo v. Minister For Labour And Manpower [1978] 1 LNS 249 ***(refd)***

Wilkinson v. Barking Corporation [1948] 1 KB 721 ***(refd)***

Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

I **Legislation referred to:**

Industrial Relations Act 1967, s. 20(1), (1A)

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)

For the appellant - Donovan Cheah, Yan Nie Th'ng & Sean Ferdinand Ng Yew Kit; M/s Donovan & Ho
For the respondent - Lingswaran Suran Singh; M/s Lingswaran Singh & Assocs

[Editor's note: For the High Court judgment, please see Ashvine Hari Krishnan v. 7-Eleven Malaysia Sdn Bhd [2022] 1 LNS 855 (overruled).]

Reported by Lina E

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] The question that arises in this appeal is one which is of relevance and importance to employment law and practice in Malaysia and it is this – whether it is an abuse of process of the court for an employee who claims that he/she has been dismissed without just cause or excuse, to file a common law action to claim, (i) damages breach of the employment contract, (ii) damages for constructive dismissal, (iii) damages for the tort of intentionally causing emotional distress, (iv) damages for the tort of harassment and bullying, (v) damages for negligence in appointing, retaining and monitoring the recruitment of employees, (vi) general and exemplary damages, instead of pursuing the statutory dispute resolution mechanism/ process to obtain the remedies as provided for under the Industrial Relations Act 1967 ("the Act").

[2] This is an appeal by 7-Eleven Malaysia Sdn Bhd ("defendant") against the decision of the learned judge of the High Court ("the judge") dated 16 March 2022 dismissing the defendant's application dated 4 January 2022 (encl. 9) filed pursuant to O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of Court 2012 ("ROC") for an order that the writ of summons and statement of claim dated 26 October 2021 in Kuala Lumpur High Court Suit No: WA-22NCVC-694-10-2021 ("Suit 694") be struck out and dismissed. The High Court's grounds of judgment are reported at [2022] 1 LNS 855. The plaintiff in Suit 694 (respondent in the appeal herein) is Ashvine a/p Hari Krishnan. For convenience, we shall refer to the parties as per their titles in the High Court. Hence, the respondent shall be referred to as plaintiff, and the appellant as defendant.

Background Facts

[3] The plaintiff was employed by the defendant as its Senior Manager of Human Resources pursuant to a contract of employment dated 9 October 2019 ("the employment contract"). She initially reported to Kung Veng Sze ("Kung"). The problem erupted when the plaintiff was instructed to report to Liew Kian Meng ("Liew") with effect from 8 February 2021. Liew was the General Manager of Human Resources for the defendant. As the plaintiff's supervisor, Liew had some concerns about her performance. Liew

raised this with the plaintiff on several occasions. The events which led to the plaintiff's resignation and subsequent filing of Suit 694 can be traced back to the plaintiff's performance and Liew's alleged conduct *vis-à-vis* the appraisal and management of her performance. The plaintiff alleged that the appraisal was inherently unfair and that she was being bullied and harassed by Liew.

[4] The matter came to a boiling point and culminated in the plaintiff resigning *via* letter dated 3 May 2021 which was accepted *via* defendant's letter dated 4 May 2021. The resignation letter made reference to certain allegations which were directed at Liew. This was not dealt with in the defendant's acceptance letter dated 4 May 2021. However, by way of a subsequent letter dated 20 May 2021, the defendant responded to the plaintiff's said allegations. There was an exchange of correspondence between the plaintiff's solicitor and the defendant's solicitors. The dispute remained unresolved. On 26 October 2021, the plaintiff filed Suit 694.

[5] The plaintiff's claim is essentially predicated on a complaint that she had been "constructively dismissed". In the statement of claim, the plaintiff claimed that cumulatively, Liew's actions, amounted to conduct by the defendant, which goes to the root of the employment contract, and is repudiatory of the employment contract. Indeed, although the statement of claim alludes to other purported causes of action, the judge made the observation (rightly in our view), that the plaintiff's claim is, in pith and substance, a claim for damages as a result of being constructively dismissed.

[6] At this juncture, it is relevant to mention that the plaintiff had been paid all her emoluments per the employment contract up the date of her resignation. Before us, counsel for the plaintiff conceded that there are no monies which are due and payable by the defendant to the plaintiff per the employment contract. The fact that there is nothing which is due and payable to the plaintiff under the employment contract, becomes relevant when we deal with the topic of the plaintiff's common law claim for damages.

[7] We turn now to consider the statutory claim and remedy for wrongful dismissal under the Act. Ordinarily, an employee who claims to have been dismissed or constructively dismissed would pursue the statutory claim under s. 20(1) of the Act. Section 20(1) reads as follows:

> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

[8] The complaint under s. 20(1) of the Act will then be referred to the Industrial Court for determination as to whether the employee (workman) had been dismissed without just cause or excuse, and to grant the appropriate remedies accordingly. The primary remedy is reinstatement together with back wages. If reinstatement is not suitable, then the Industrial Court may grant salary *in lieu* of reinstatement based on one month's salary for every year of service, together with back wages but the final amount will be subject to the Industrial Court's discretion to make deductions for any post-dismissal earnings and reduction for any "contributory conduct" (see Second Schedule to the Act).

[9] The statutory remedy for wrongful dismissal is however, not open-ended as there is a strict time-line for any complaint to be lodged. Thus, pursuant to s. 20(1A) of the Act, the dismissed employee (workman) must lodge a complaint with the Director General of Industrial Relations within 60 days of the dismissal. In the present, the plaintiff chooses not to lodge a complaint under s. 20(1) of the Act that she had been dismissed without just cause or excuse. From the facts, it is obvious that the plaintiff was advised to file a civil suit instead of invoking the statutory process under the Act. Counsel for the plaintiff said that it is up to the plaintiff whether she wanted to invoke the statutory process per s. 20(1) of the Act, or alternatively to pursue a common law claim.

[10] The substantive issue in this appeal is whether the plaintiff's claim for constructive dismissal, which ought or could have been pursued *via* s. 20(1) of the Act, can be brought together with other purported causes of action and filed as a common law claim for substantial damages. In this regard, it is necessary to keep in mind that if the claim of wrongful dismissal had been taken to the Industrial Court and it is established that the complainant (employee/workman) had been dismissed without just cause or excuse, the remedy that Industrial Court will grant is quite possibly reinstatement, and compensation *ie*, back wages and/or salary *in lieu* of reinstatement, as the case may be.

[11] The defendant moved the High Court by way of encl. 9 and contended that the plaintiff's claim predicated on constructive dismissal can only be pursued *via* s. 20 of the Act. Thus, as far as the defendant is concerned, Suit 694 is a manifestation of an abuse of process. The defendant has described the plaintiff as a disgruntled ex-employee, who resigned from employment as she disagreed with the assessment of her performance. Thus, her claim (per Suit 694) is scandalous, frivolous and/or vexatious, and was filed purely to annoy the defendant.

[12] According to the defendant, the plaintiff made a conscious decision not to pursue a claim in the Industrial Court and has instead abused the court's process by filing a claim for more than RM96 million, which is said to be without legal basis and which, therefore, has no prospects of success. On the premises, the defendant argues that Suit 694 ought to be struck out and dismissed.

A **Liew's Appraisal Of Plaintiff's Performance**

[13] As stated earlier, Liew, as the plaintiff's supervisor, had concerns about the plaintiff's performance. He raised this to the plaintiff on several occasions including *via* an email dated 24 February 2021, where he stated:

B (i) the plaintiff's team was viewed as not adding value;

(ii) the plaintiff as the team lead therefore needed to "buck up" in defining what steps needed to be taken by the team to be measured as effective;

(iii) the plaintiff should review how work is currently being done, how does it measure up and if there was a need to strategise;

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(iv) the plaintiff needs to consider how she would be measured in terms of relevant key performance indicators ("KPI") instead of her own list that she had; and

(v) the plaintiff should look into the events planned for employee

D engagement.

[14] By a notice dated 11 March 2021 ("notice") to the plaintiff, Liew highlighted his concerns on the plaintiff's performance, which, according to Liew, demonstrated poor leadership and management. In this regard, *via* the notice, Liew informed the plaintiff that:

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(i) the plaintiff did not have a timely response, for example during the communication to all employees regarding the COVID-19 vaccination procedure;

(ii) the plaintiff failed to follow up with her direct subordinates on areas and

F points of discussion in meetings which the plaintiff was absent so she would at least be kept updated;

(iii) the plaintiff was not adding value in making sure that the quality of communications was ensured; and

G (iv) the plaintiff did not have a clear understanding of the business needs and the plaintiff did not have the focus to deliver.

[15] According to the defendant, the plaintiff was not open to any form of constructive feedback and instead claimed that she was being bullied and harassed by Liew. The defendant contends that the plaintiff reacted in a

H hostile manner and was uncooperative with Liew. Among other things, the plaintiff demanded that Liew retract the notice and copy it to his superiors and the organisation's grievance channel within 14 days.

[16] The plaintiff also raised a complaint of the alleged bullying and harassment to the Group Internal Audit team of the defendant. After

I investigating the matter, the Group Internal Audit found that there was no evidence of bullying and harassment. The plaintiff was advised to lodge a

formal complaint following the defendant's grievance procedure if she wished to pursue it further. However, no formal complaint was lodged by the plaintiff.

[17] By letter dated 23 March 2021, the defendant confirmed that the plaintiff's final performance assessment was graded as "C" for "Inconsistent Performance". She received a performance bonus of RM2,418 and her last drawn salary was RM13,130.

Resignation Letter

[18] The plaintiff resigned *via* letter dated 3 May 2021 ("resignation letter"). She alleged that her reasons for resigning were bullying and harassment and that the notice issued to her was unfair. These allegations were all directed at Liew. The resignation letter (addressed to Liew) reads as follows:

> Dear Mr Liew,
>
> I am writing to tender my resignation effective 3 May 2021 and will be serving the 3 months notice as stated in my employment contract. The reason for my resignation is the *unfair treatment which am experience due to harassment and bullying which has resulted in a toxic working environment that is detrimental to my health.*
>
> *I have raised my dispute on the unfair treatment as well as your bullying and harassing behaviour towards me, however, based on the last meeting which you had called for, you have adamantly refused to retract your unfair notice.*
>
> Therefore, I am tendering my resignation in protest of this detrimental working conditions which are not conducive to my productivity and resulting in serious negative implication to my health.
>
> (emphasis added)

Defendant's Letter – 20 May 2021

[19] The plaintiff's resignation was accepted *via* defendant's letter dated 4 May 2021. Thereafter, by letter dated 20 May 2021, the defendant specifically addressed the plaintiff's allegation of bullying and harassment and denied the allegations. The defendant clarified that the notice was issued in good faith with the aim of aiding the plaintiff to improve her performance at work. The defendant's letter reads as follows:

> **Re: Acceptance Of Resignation**
>
> Reference is made to your resignation letter dated 3rd May 2021 and your resignation was accepted by way of our letter dated 4th May 2021.
>
> With regards to your unfounded allegation in your letter indicating that, amongst others, you were unfairly treated and experienced bullying and harassment, we categorically deny them. Please note that the notice issued to you which you found unsatisfactory was issued in good faith with the sole aim of aiding you to improve your performance which in the opinion of the management needs improvement.

A It is also noted that in the meeting on 15th March 2021 with you, you were advised that you are entitled and encouraged to raise your grievances *via* the Company's official grievance channel.

[20] By way of her solicitor's letter dated 20 May 2021, the plaintiff claimed the sum of RM4.5 million from the defendant as damages, in addition to RM500,000 for alleged depression, shame, harassment and trauma. The defendant responded to *via* solicitor's letter dated 2 June 2021 to deny the claim.

Defendant's Solicitor's Letter – 2 June 2021

[21] By letter dated 2 June 2021 the defendant's solicitors wrote to the plaintiff's solicitors and rejected the claims and complaints. The letter reads as follows:

Re: Letter Of Demand For Breach Of Employment Contract Failure To Maintain A Safe And Conducive Working Environment, Harassment, Bullying, Mental Distress And Constructive Dismissal

We refer to the above matter wherein we act for 7-Eleven Malaysia Sdn Bhd and the letter of demand dated 20.5.2021.

2. Our client denies the contents of the letter of demand dated 20.5.2021 in regard to, among others, allegations of harassment, bullying, failure to maintain a safe and conducive working environment and purported breaches of the of your client's contract.

3. Our client maintains that your client was performing below the standards expected of a Senior Manager. Her work performance in regard to her leadership and management of her team required improvement. Your client was therefore put on notice of the same *vide* e-mails dated 24.2.2021 and 11.3.2021 from Mr Liew Kian Meng, with the purpose of providing her an opportunity to be aware of her shortcomings in the exercise of her duties as Senior Manager and to accord her a fair opportunity to improve her work performance.

4. During the material time, our client also undertook a restructuring exercise in the Business Group Human Resource department, which works closely with our client's store operations, for the following reasons:

(a) To drive training effectiveness in our client's stores by partnering local operations team; and

(b) To reduce attrition and focus on recruitment to meet store headcount targets by working with local operations team.

5. Our client considers it most unfortunate that your client has wrongly regarded its managerial prerogatives to elevate your client's work performance and improve our client's operation at fundamental of your client's employment contract and/or an attempt to constructively dismiss your client.

6. Based on the foregoing, the 3 purported breaches of the terms of your client's employment contract, as stated in the letter of demand dated 20.5.2021, are without any basis.

7. Our client notes that you have your client's instructions to lodge a claim with The Malaysian Arbitration Tribunal. We have our client's instructions to inform your client that:

(a) there is no arbitration agreement between your client and our client wherein the parties had agreed to submit disputes to be resolved by an arbitral tribunal; and

(b) our client does not accede to the jurisdiction of the said arbitral tribunal and/or any other arbitral tribunal.

Our client notes that your client has resigned on 3.5.2021 and will be serving her 3 months notice period until 2.8.2021. Our client will be placing your client on garden leave effective immediately for the remaining period of her employment until 2.8.2021.

9. During the period of the garden leave, your client:

(a) is not required to present herself at our client's premises nor to attend any matters within her job duties including contacting or transacting with any employees, clients/customers or partners of our unless instructed by our client;

(b) shall ensure that she is contactable and available to present herself at our client's premises whenever required to do so by our client;

(c) shall continue to be bound by all the terms and conditions of her employment contract and/or all policies and rules of our client; and

(d) shall be entitled to and will receive her full salary and other contractual benefits until her last date of employment on 2.8.2021.

10. As your client is not required to present herself at our client's premises nor to attend any matters within her job duties during the remaining period of her employment, your client is required to return all company assets in her possession including but not limited to the laptop and its provided accessories, handphone and its provided accessories, petrol card, parking access card, office access card, office keys, name stamp, business cards *etc.*

11. Our client will contact your client to make the necessary arrangements, which would be in compliance with the laws and regulations in place during the Total Lockdown, for the return of the company assets. Please note that our client shall return the aforesaid company assets to your client should the need arise for your client to present herself at our client's premises or to resume performing her job duties during the remaining period of her employment.

[22] Given the defendant's denial, the plaintiff *via* solicitor's letter dated 23 June 2021 then revised her claim, increasing it to "RM71.1 million", and offered to accept RM37.5 million in settlement but that the offer will expire at "7.11pm, 30 June 2021". The defendant refused to accede to the plaintiff's

demands. The defendant highlighted that the reference to "7.11" in the said letter is an obvious "play on words" as 7-Eleven is part of the defendant's name.

Damages Sought In Suit 694

[23] On 26 October 2021, the plaintiff filed Suit 694 claiming the following reliefs (amounting to a global sum of RM96,032,956.40):

(i) RM6,032,956.40 as damages for alleged breach of the employment contract representing the alleged employment benefits of the plaintiff for 20 years;

(ii) RM10,000,000 as damages for constructive dismissal;

(iii) RM10,000,000 as damages for the tort of intentionally causing emotional distress;

(iv) RM10,000,000 as damages for tort of harassment and bullying:

(v) RM10,000,000 as damages for negligence in appointing, retaining and monitoring the recruitment of employees;

(vi) general damages; and

(vii) RM50,000,000 as exemplary damages.

Pre-Action Full And Frank Disclosure

[24] In the meanwhile, prior to filing Suit 694, the plaintiff's solicitors prepared a document titled as "Pre-Action Full and Frank Disclosure" ("pre-action document") dated 23 June 2021 and served it on the defendant's solicitors. The said document explained the basis of the plaintiff's purported complaints against the defendant. The relevant parts of the pre-action document (which seems more like a witness statement), reads, (without the juxtaposition of extracts from various documents) as follows:

1. Our client had resigned with grievance of harassment and bullying on the 3rd of May 2021. Liew Kian Meng had accepted the resignation with a grievance on the 4th of May 2021. There is no reason for 7-Eleven to accept such a resignation if they were not admitting to any of the complaints raised.

2. Furthermore, Liew Kian Meng's hasty acceptance of the resignation only suggests that he had been expecting our client to resign due to all the undue pressure, harassment, bullying and unethical conducts from him. Accepting the resignation of a permanent staff which clearly states that she is resigning due to harassment and bullying shows negligence.

3. Apart from negligence it also supports our assertion that Liew Kian Meng clearly was pressuring our client into constructive dismissal with unethical, unreasonable, unprofessional conduct. Accepting a permanent staff's resignation of grievance would be *prima facie*, considered as constructive dismissal.

4. There is also a 7-Eleven's Vacancy Notice dated 6 April 2021. Simple perusal of the job requirements clearly suggests a position for a Senior Managerial position for Learning & Development (Human Resources). A balance of probabilities would suggest that the General Manager had plans to replace our client even before proper consideration of her work performance.

5. There is ample evidence of Liew Kian Meng trying to pressure our client into constructive dismissal. All elements of constructive dismissal are clearly present and tangible through the documents tendered. We express regret and dismay that our first Letter of Demand had failed to convince you of the wrongful conducts of Liew Kian Meng.

6. Our client had demanded that Liew Kian Meng stop his bullying and harassment, to retract his notice in writing with a written apology copying his superiors and the organisation grievance channel within 14 days.

7. However, Liew Kian Meng had refused to apologise and had trivialised her complaints in a meeting he called on the 15th of March 2021 as a response to Exhibit A. We attach the entire transcript of the meeting for your perusal.

8. This is clearly a repudiatory breach of a fundamentally implied term. More so when our client has raised the matter in writing. We assure you that he was not telling our client to buck up, but quite literally he told her to get uncomfortable.

9. Liew Kian Meng has used unprofessional and disparaging language in communicating with our client. It is an outrage when a General Manager asks his subordinate to get "uncomfortable". Liew Kian Meng had made work so uncomfortable for our client that she was pressured into resignation.

10. Apart from using disparaging words such as "not adding value", "need to buck up", and implying that our client is ineffective, contents of Liew Kian Meng's email clearly shows that there is breach of contract as it is not within our client's obligation to add value or even provide a method to measure his baseless allegations.

11. Liew Kian Meng had instructed communications regarding Covid-19 vaccination did not have to go out. We have minutes of meeting on the 8th of March 2021 where it is shown that he had instructed so. We attach the minute here for your perusal. While our client followed his instruction, he berated her for not acting in a timely manner.

12. Liew Kian Meng had penalised our client for 'not meeting expectations' of standards which she was never required to before, an error she did not actually commit. His complaints regarding our client's work performance and managerial skills is grossly premature and uncalled for except for pressuring her into resignation.

13. Our client had insisted that Liew Kian Meng apologise for the harassment, retract his remarks about her, and that he copies his superiors. Liew dismissed her claims very carelessly as demonstrated in the transcript referred to. Liew Kian Meng as a Human Resource Manager failed to act on a serious complaint of harassment and bullying simply because they were not "aligned". He had suggested that she take her grievance to the Grievance Channel, which is headed by himself.

14. In the meeting held between our Client and Lew Kian Ming, she had several times explained that she feels harassed, bullied, and targeted. However, Liew Kian Ming refused to apologise or take any action on her complaints. His excuse that our client had needed to buck up is a he, as he had been asking her to add value and even provide him with a guide to evaluate her work performance. On top of that simple due diligence would show that our client has excellent work performance recognised by 7-Eleven itself.

15. Liew Kian Meng had made it clear that he was disregarding our client's satisfactory or exemplary quality of work performance despite plenty of evidence. He had also refused to recognise 7 Eleven's Performance Evaluation of Ashvine Dated 16 February 2021.

16. We refer you to an email from Kung Ven Sze dated 16 February 2021. Kung Ven Sze was the previous General Manager Human Resource until 16th February 2021 and *via* that email had given our Client a B for "meeting expectations" for her Performance Dialogue & Appraisal. (Exhibit F).

17. Our client had approval even from the previous CEO. As seen in Exhibit J she was instrumental in delivering the Town Hall professionally. Liew Kian Meng's disparaging remarks are unfounded to say the least. He was pressuring our client into resignation and the comments on her performance are in bad faith.

18. As seen above she also has approvals from the head of the legal department. In 2020 and 2021 she was responsible for launching and communicating the ABAC Policy. Liew Kian Meng took over the position from Kung Ven Sze on the 18th of February 2021 and made the disparaging remarks on 24th February 2021.

19. Our client has approval from the Assistant General Manager for her speed in communication and proactiveness. Liew Kian Meng had only one intention in mind while dealing with our client and that was to make it so uncomfortable to work that she would be pressured into resigning.

20. Our Client has approval from the Co-Chief Executive Officer for her efforts in claiming for RM801,000.00 from the Human Resource Development Fund in September 2020. While in 2019, Liew Kian Meng was the supervisor that had enabled a corrupt Senior Operation Manager to receive monies into his personal account under the Company for Profit Builder 2018 program.

21. Our client was as a matter of fact performing very well and all her bosses prior to Liew Kian Meng had assessed her performance to be meeting expectations. Our client was given an increment of RM130.00 in December 2020. Our client was also given a bonus of RM 2418.00 in March 2021. The only person who had any issues with our client's performance is Liew Kian Meng.

22. Liew replaced the previous General Manager and under 40 hours concluded that our client is under performing. We have documents to corroborate that Liew Kian Meng may most likely than not be motivated by intention to carry out corrupt practices and in furtherance of that wrong has caused constructive dismissal of an excellent permanent employee.

23. We seek your special attention to the fact that our client was instrumental in resolving the issue above. 7-Eleven had about 900 foreign workers without proper documents and our client understood the liability 7-Eleven faced and acted promptly to resolve the matter professionally.

24. Our client was also chosen to represent 7-Eleven Malaysia to receive the Best Employer Brand Awards 2020 on the 15th of December. Given all the above, we are most certain that Liew Kian Meng's only intention was to pressure our client into resigning.

25. Given the fact that Liew Kian Meng took office on the 18th of February 2021 and had recklessly criticised our client by the 24th of February 2021, and again on 11 March 2021, it is obvious he was trying to make her feel uncomfortable and pressured to resign.

26. The so-called "restructuring" was only for advancing this constructive dismissal. There was no real restructuring, the stall that Liew Kian Ming took away from our client were already reporting to him indirectly through her.

27. Liew Kian Ming is the General Manager of Human Resource, it makes no sense whatsoever to remove staff from his own senior manager just to be placed under himself. This "restructuring" was meant to pressure our client into resignation.

28. The above is an e-mail from the Human Resource Manager sending the new organisational chart, transition slide, and the person in charge. This restructuring that was done properly was only in April 2021. Clearly Liew Kian Meng's "restructuring" was not a part of 7-Eleven's official plans and was only to pressure our client into resignation.

29. Liew Kian Meng has clearly expressed ill intentions by intimidating our client that her Performance Evaluation will be affected. Firstly, our client has an unblemished work performance, neither was there any problems in regard to her leadership and management.

30. Liew Kian Meng used manipulative tactics to pressure our client into resignation. We believe he may be motivated by the fact that he was able to get away without having to answer for corrupt practices which he enabled in 7-eleven previously.

31. Liew Kian Meng had changed our client's duties by telling her that he was expecting of her what the company had not expected in the past. While there was proper restructuring that was exercised and executed on 17th April 2021, Liew Kian Meng had not bothered to follow and decided to remove 6 staff members from our client simply to report directly to him.

32. There was absolutely no reason for Liew Kian Meng to reprimand our client in the manner which he did. Our client was head hunted by 7-Eleven and paid an estimate of RM35,000.00 to hire her for RM13,000.00 a month.

33. 7-Eleven had diligently hired our client as a permanent staff, it is humiliating to say the least when Liew Kian Meng asserted that she had no value and deemed as ineffective to the organisation given her excellent track record.

34. Liew Kian Meng had not only used unprofessionally crude and disparaging language against our client, but also had made outrageous remarks about her work performance which was baseless whatsoever.

35. Liew Kian Meng had removed staff from our client just to get them to report directly to him. While he had reprimanded her for allegedly poor performance, removing her staff only works to the detriment of 7-Eleven apart from being another classic THE element of constructive dismissal.

36. Our client had raised serious concerns of harassment and bullying to Liew Kian Meng, who is also the head of the grievance channel. She had demanded that he apologise and to copy his superiors. However, he refused to do so and redundantly asked her to use the grievance channel.

37. By doing so Liew Kian Meng had committed serious breaches of 7-Eleven's grievance procedures. He was supposed to excuse himself and forward the matter to the attention of his superiors, however, chose to remain silent about it.

38. Liew Kian Meng had several times dismissed our clients' complaints about harassment on the grounds that he and our client are not "aligned". However, in corroborating the above it is clear that Liew Kian Meng did not take the complaints seriously because he was inclined to pressure her into resigning.

39. Liew Kian Meng had several times dismissed our clients' complaints about harassment on the grounds that he and our client are not "aligned". However, in corroborating the above it is clear that Liew Kian Meng did not take the complaints seriously because he was inclined to pressure her into resigning.

40. Liew Kian Meng has not only refused to apologise or take our client's complaints seriously, but he had also forced her to write down minutes according to what he dictates. He also displayed hostility by refusing to understand that our client was on unpaid leave, and she was attending to her ill father who needed hospitalisation.

41. Liew Kian Meng asserted to our client that instances of poor leadership and management is, timely response, not to follow up with subordinates, value adding and understanding the business. These are undoable demands even if they were instances of good leadership and management, demanding added value is a clear breach of contract.

42. Liew Kian Meng had acted unethically when he removed six staff from our client. He was essentially isolating her and not providing her the necessary support towards achieving the goals he has set. As a matter of fact, Liew Kian Meng was asking our client to deviate from what was expected of her before this.

43. Further Liew Kian Meng would not be able to show even a single situation in which our client did not achieve required output or expected duties. The 7-Eleven Wiki guide on Managing Performance clearly states that deviation from standards or quality of work and expected outputs is poor performance.

44. However, that is exactly what Liew Kian Meng is asking our client for, which is not only against the contract and 7-Eleven policies but also another way to pressure our client into resigning. Clearly Liew Kian Meng had no regards to the fact that our client was a permanent employee.

45. Besides giving confusing instructions and has also used very crudely unprofessional language with our client. Apart from that he has demanded our client to follow confusing poor work performance as per his fancy. Liew Kian Meng had also lied about our clients work performance assessment results.

46. As General Manager, Liew had employed crudely unprofessional language with our client with intentions to make her work so stressful and uncomfortable that she would eventually resign. He had recklessly used disparaging language to damage our client's mental and emotional wellbeing.

47. Liew Kian Meng had conducted a pointless and redundant restructuring exercise independent of 7-Eleven's proper and legitimate restructuring. The so-called restructuring only effectively isolated our client from her colleagues. The "restructuring" done personally by Liew Kian Ming had not been approved by the CEO.

48. Liew Kian Meng had clearly refused to take responsibility for behaving in an unacceptable manner. He had dismissed our clients' complaints of harassment and bullying. He instead removed her staff that were in fact reporting to him through her.

A

49. Liew Kian Meng has very poor professional standards as he employs crudely unprofessional language against our client. He also fails greatly as a General Manager for carelessly and recklessly breaching implied terms of an employment contract.

B

50. Not only was Liew Kian Meng's assertion on our clients work performance premature but also without any just cause or excuse whatsoever. It took Liew less than 5 days of consideration before asserting that her work performance was poor while he did not consider evidence to the contrary.

C

51. Liew Kian Meng had put our client on notice for no good reasons. It is not even a standard procedure in attending to anyone who is underperforming in 7-Eleven. Liew Kian Meng decided to give undue pressure to our client only to make work so uncomfortable that she would resign.

D

52. It is obvious that Liew Kian Meng was as a matter of fact putting our client under undue pressure and it is clear that his intention is to make work so uncomfortably pressuring that she will eventually resign. Citing all the above, your client is vicariously liable for all the mismanagement and wrongs done by Liew Kian Meng against our Client.

E

53. We have cited 15 independent reasons that give rise to constructive dismissal. Your client does not have any sustainable defence against all the above. Your justification of Liew Kian Meng's unacceptable conduct only further depicts the extent to which his mismanagement and unethical has caused damage not just 7-Eleven but perhaps also your good self.

F

54. Our client had made it clear that she wanted Liew Kian Meng to stop harassing and bullying her. However, he had refused to do so and had dismissed her complaints. Such conducts are unacceptable and clearly for the sole purpose of making it difficult for our client to continue to work there.

G

55. The statements made by Liew Kian Meng *via* e-mails are as a matter of fact intended to defame our client. They are untrue statements given her excellent work performance track record. The libel was published *via* email to Lizawati binti Ramli on the 24th of February 2021.

H

56. From the above, clearly Liew Kian Meng has intentionally caused emotional, mental, and even aggravated physical distress suffered by our client. Liew Kian Meng was completely aware that he was putting our client under undue stress and pressure. He was also aware that she was attending to her ill father. However, he only had intentions to pressure her into resignation hence did not bother of her mental, emotional, and medical wellbeing.

I

High Court – Grounds For Dismissing Encl. 9

[25] The defendant filed encl. 9 under O. 18 r. 19(1)(a), (b), and/or (d) ROC. The defendant contended that the High Court lacked the requisite jurisdiction to hear and determine the plaintiff's claim which was essentially a claim for constructive dismissal which ought to have been pursued *via* s. 20 of the Act. The defendant also took the position that Suit 694 was an "abuse of process".

[26] The judge disagreed with the defendant and dismissed encl. 9. The judge opined that the plaintiff's claim was essentially a claim for "constructive dismissal" and that whilst the plaintiff is entitled to pursue a claim for dismissal without just cause or excuse (per s. 20 of the Act) in the Industrial Court, the High Court nevertheless had jurisdiction to deal with and determine the claim as presented in Suit 694.

[27] The judge concluded that the Act did not "oust" the High Court's jurisdiction. The judge's grounds of judgment have been reproduced in its entirety, and they read as follows:

> [1] The Defendant applied to strike out the Plaintiff's claim for damages for wrongful termination of service against the Defendant. The Defendant's application was made in pursuant of Order 18 Rule 19 of the Rules of Court 2012 ("the Rules").
>
> Brief Facts
>
> [2] The Plaintiff was a former employee of the Defendant whereby by virtue of an agreement signed between the Plaintiff and the Defendant on 19/10/2019, the Plaintiff was appointed as a senior manager at the human resource division of the Defendant.
>
> [3] The Plaintiff's claim basically is aimed at the General Manager in the Human Resource Department by the name of Liew Kian Meng who had persistently harassed and insulted the Plaintiff to an extent that the Plaintiff was pressurised into quitting her job on 3/5/2021.
>
> [4] The Plaintiff also contended that the Defendant as a company was negligent in allowing the said general manager to create an unconducive atmosphere at the workplace and to monitor the activities at the workplace.
>
> [5] The Plaintiff alleges further that the Defendant has breached the contract of service resulting the Plaintiff from suffering various losses including loss of salary and causing mental anguish to the Plaintiff.
>
> [6] The Defendant's application to strike out the Plaintiff's claim is on the grounds that the manner in which the statement of claim is drafted shows no cause of action against the Defendant, the High Court has no jurisdiction hear matter to constructive dismissal or unjust dismissals and finally the exorbitant amount of damages claimed by the Plaintiff.

A The Issues

[7] The various grounds for striking out are as stated in Order 18 Rule 19 and for ease of reference are reproduced here are as follows:

19. Striking out pleadings and endorsements (O. 18 r. 19)

B (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

C

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may

D order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1) (a).

E [8] Based on the above provision of the Rules the Court ruled that the issues to be determined in this case are whether the Plaintiff's statement of claim discloses any cause of action against the Defendant, whether the Court has jurisdiction to hear constructive dismissal claim and whether the exorbitant sum claimed is an abuse of the process of court.

The Plaintiff's Statement of Claim

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[9] The main grouse of the Defendant against the Plaintiff's claim is that the manner the statement of claim is drafted appears as a long-winded rant of a dissatisfied employee against the General Manager of the human resource division of the Defendant by the name of Liew Kian Meng. As such it does not disclose any cause of action against the

G Defendant.

[10] The manner in which a statement of claim should be drafted is clearly spelled out in Order 18 Rule 7 of the Rules which states as follows:

7. Facts, not evidence, to be pleaded (O. 18 r. 7)

H (1) Subject to the provisions of this rule and rules 10, 11 and 12, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.

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(2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.

(3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.

(4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.

[11] The Court agrees with the contention of the Defendant that the Plaintiff's statement of claim does not comply with the above provision whereby many irrelevant facts have been stated.

[12] The Court agrees that the Plaintiff's claim could have been condensed to comprise only the material facts and this could be done in very few paragraphs unlike the length that appears at present.

[13] Leaving aside the non-compliance of the above provision of the Rules however the more important issue in the Court's view is whether the claim discloses any cause of action against the Defendant.

[14] Looking in the totality of the facts pleaded the Court is satisfied that the claim does disclose a cause of action against the Defendant which merits a full trial of the matter.

[15] In short this is not a fit matter to be summarily dismissed under Order 18 Rule 19 of the Rules.

The Court's Jurisdiction in Hearing Constructive Dismissal Cases

[16] It is an *undisputed fact that the facts as pleaded by the Plaintiff points to a claim for constructive dismissal or dismissal without just cause.*

[17] The Defendant refers to section 20 of the Industrial Relations Act 1967 which provides that any representations for dismissal without just cause to the Director General who can on his discretion refer the matter to the court. The courts for the purpose of the Act are identified as the Industrial Courts.

[18] However the Court is of the view that *the provisions of the Industrial Relations Act does not oust the jurisdiction of the civil courts in determining issues of unjust dismissal or constructive dismissals.*

Exorbitant Claim

[19] The main grouse of the Defendant against the relief sought by the is the exorbitant amount of damages claimed by the Plaintiff. The Defendant contends that this exorbitant sum claimed makes this claim frivolous, vexatious and an abuse of the process of court.

A [20] The Defendant further contends that the exorbitant amount claimed is aimed at annoying and embarrassing the Defendant and not a genuine claim. The Defendant relies on a number of court decision to support its contention.

[21] However this Court is of the view that *the Plaintiff is at liberty to claim*
B *whatever sums she feel she is entitled to. The colossal amount claimed cannot be regarded as an abuse of the process of court or a means to strike out the claim summarily.*

[22] The *assessment of the damages will be finally determined by the Court based on the legal principles and therefore there is no law against excessive claims by the Plaintiff.*
C

Conclusion

[23] Based on the factors above the Court dismissed the Defendant's application to strike out the Plaintiff's claim under Order 18 Rule 19 of the Rules with a cost of RM2,000. (emphasis added)

D **Our Decision**

Constructive Dismissal

[28] As rightly observed by the judge at para. [16] of the grounds of judgment, the plaintiff's claim is for constructive dismissal. The concept of
E "constructive dismissal" is of course well-established in Malaysia. The *locus classicus* on constructive dismissal is the Supreme Court case of *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; [1988] MLJ 92 ("*Wong Chee Hong v. Cathay*").

[29] In the recent case of *Matrix Global Education Sdn Bhd v. Felix Lee Eng*
F *Boon* [2023] 2 CLJ 34; [2022] MLJU 3174 ("*Matrix*"), the Court of Appeal considered the case of *Wong Chee Hong v. Cathay* and had the opportunity of examining the requisite legal test for constructive dismissal and the requirements in terms of the burden of proof. Essentially, the Court of Appeal in *Matrix* endorsed the trite proposition that the test for constructive
G dismissal is the "contract test" and not any unreasonable behaviour on the part of the employer. Thus, the conduct complained of must be repudiatory of the employment contract. The Court of Appeal's observations are captured in the following paragraphs of the judgment:

[28] With respect to the test to be applied for the claimant in the
H Industrial Court to prove constructive dismissal, we need only to turn to the *locus classicus* in the Supreme Court case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ (Rep) 298 at pp. 301-302:

> The common law has always recognised the right of an
I employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or

shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression "constructive dismissal" was used. It must be observed that para. (c) never used the words "constructive dismissal".

This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thought, and a few decisions were made, that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of *Western Excavation* (*supra*) reiterating an earlier decision of the Court of Appeal presided by him (see *Marriott v. Oxford and District Co-operative Society Ltd.* [1969] 3 All ER 1126) rejected this test of unreasonableness.

Thus, it is clear that even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed, if it were so, it is dangerous and can lead to abuse and unsettled industrial relation. Such proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier and goes no further. Alternative expression with the same meaning, such as "implied dismissal" or even "circumstantial dismissal" may well be coined and used. But all these could not go beyond the common law test.

When the Industrial Court is dealing with a reference under s. 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concepts to the UK legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from para. (c) of s. 55(2) of the UK Protection of Employment Act 1978. Therefore, we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in UK should be introduced as an aid to the interpretation of the word "dismissal" in our s. 20. We think that the word "dismissal" in this section should be interpreted with reference to the common law principle. *Thus, it would be a dismissal if an employer is guilty of a breach which goes to the root*

A *of the contract or if he has evinced an intention no longer to be bound by it. In such situation the employee is entitled to regard the contract as terminated and himself as being dismissed.* (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd.* [1970] Lloyd 2019 LR 486). (emphasis added)

B [29] As for the burden of proof of constructive dismissal, guidance may be had from the *dicta* in *Moo Ng v. Kiwi Products Sdn Bhd Johor & Anor* [1998] 3 CLJ 475 at p 498 where the High Court observed as follows:

C *If an employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an express or implied term of the contract of employment going to the very root of the contract. It can safely be said that one term which, if not express, may be implied in a contract of employment and it is that the employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of the contract.*

D What has to be ascertained is whether in all the circumstances of the case the responsibilities and duties of the employee have been so altered by the employer as to constitute a breach of a fundamental term of the contract of employment. (emphasis added)

E **[30]** Thus, regardless of whether an employee has been dismissed by the employer (direct dismissal), or whether the employee left the employment or walked out of the workplace, or was forced or compelled, or put in a situation where he/she had to resign (indirect dismissal/constructive dismissal), the position under Malaysian industrial jurisprudence is that an F employee who finds himself in such a situation is legally entitled to have recourse to the statutory dispute resolution mechanism per s. 20 of the Act and may seek reinstatement and monetary compensation as a result of having been dismissed without just cause or excuse.

Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat

G **[31]** Until recently, it was the case that where a claimant does not plead the relief of reinstatement, or does not pursue reinstatement as a remedy, the Industrial Court will cease to have jurisdiction to hear the complaint under s. 20(1) of the Act and the claim will be struck out. That was the legal position per the High Court's decision in *Holiday Inn Kuching v. Elizabeth Lee* H *Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521; [1992] 1 MLJ 230. However, as a result of the Court of Appeal's decision in *Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat* [2021] 6 CLJ 700, [2021] 5 MLRA 133, [2021] 4 MLJ 924, [2021] 3 MELR 375 ("*Sanbos*") the position now is that the Industrial Court does not cease to have jurisdiction merely because the I remedy of reinstatement was not pleaded or asked for by the claimant at the hearing before the Industrial Court.

Section 20 Strict Timeline – *V Sinnathamboo*

[32] As stated earlier, the complaint of wrongful dismissal must be made within 60 days from the date of the dismissal. (see: s. 20 (1A) of the Act). The statutory time limit is a mandatory provision and a failure to file a complaint within the statutory time limit is "fatal". (see: *V Sinnathamboo v. Minister For Labour And Manpower* [1978] 1 LNS 249;[1981] 1 MLJ 251 (HC)). It is also relevant to mention that in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156; [1981] 1 MLJ 238 (FC) ("*Fung Keong Rubber*"), the Federal Court had explicitly stated that the time limit under the Act is a mandatory provision and any non-compliance in this regard will go to the jurisdiction of the Industrial Court. Thus, the Industrial Court will not have the requisite statutory jurisdiction to hear any complaint under s. 20 of the Act if it is out of time. This is what the Federal Court said:

> Under section 20(1) of the Act, a workman who claims reinstatement for wrongful dismissal is bound to comply with a very strict time limit. He must present his claim within one month of the dismissal. There is no similar escape clause as is provided by paragraph 21(4) of Schedule 1 to the (UK) Trade Union and Labour Relations Act, 1974, on the ground that it is "not practicable" to present a claim within the statutory period: see, for instance, *Wall's Meat Co Ltd v. Khan* [1979] ICR 52. It is for that special reason that the time-limit clause with no escape clause is inserted in the section. It is so strict that it goes to the jurisdiction of the industrial court to hear the complaint. By that we mean that, if the claim is presented just one day late, the court has no jurisdiction to consider it.

[33] In this case, although the plaintiff ought to have lodged a complaint under s. 20 of the Act she chose not to do so. It is quite clear from the statement of claim that the plaintiff had all along been legally advised. As such, she knew or ought to have known what her legal rights were. Based on the position taken in the written submissions and oral clarification, it may be inferred that she was advised to file a common law claim, and not to pursue any claim in the Industrial Court.

[34] As mentioned in the earlier part of this judgment, all contractual payments that the plaintiff was entitled to upon her resignation were duly paid. Hence, what is really at issue here is whether the plaintiff is entitled to pursue a claim for constructive dismissal in the High Court and obtain colossal damages of the type and magnitude as appearing in the statement of claim.

[35] It is obvious that the plaintiff had lodged a "common law" claim for loss of employment and a separate claim predicated on constructive dismissal. The plaintiff has also pleaded other alleged causes of action such as the "tort of intentionally causing emotional distress", "tort of harassment and bullying" and the "tort of negligence in appointing, retaining and monitoring the recruitment of employees". There is also a claim for general damages and exemplary damages.

A **[36]** We will take each of these in turn.

[37] The starting point is the seminal decision of the Federal Court in *Fung Keong Rubber* (*supra*) where it was posited that an employee cannot sue for "wounded feelings" or "loss of reputation" caused by a summary dismissal (see p. 239 of the judgment – per Raja Azlan Shah, CJ Malaya).

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[38] Thus, the proper question to be asked is whether in light of the common law's stricture on the remedies that are available to an employee who claims to have been wrongfully terminated, or constructively dismissed (forced to resign *etc.*), and where all contractual dues have been paid, a claim in the civil court which is predicated on a claim for loss of employment and damages for constructive dismissal (together with other alleged associated causes of action) where substantial damages are sought, may be regarded as an abuse of process, and which ought to be struck out summarily.

C

[39] In our view, following the principle that was enunciated in *Fung Keong*, the so-called tort of emotional distress is, unmaintainable. Next, the allegation of negligence is in regard to the defendant's decision to appoint Liew as General Manager of Human Resources. The plaintiff is of the view that the defendant was reckless in appointing Liew. However, we do not see how this can translate into a cause of action in favour of the plaintiff in circumstances where it has not been demonstrated that the defendant owed a duty of care to the plaintiff in the appointment of their employees. Of course, an employer's failure to appoint competent co-workers *etc.* may perhaps be relevant to an injury-at-work type situation, but this is not such a case. Here is a case, plain and simple, where the plaintiff could not accept Liew's appraisal of her performance, and where she also alleged that he bullied and harassed her.

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[40] In our view, the so-called tort of harassment and bullying referred to in the statement of claim and the pre-action document are at best, "building blocks" for a complaint of constructive dismissal. Hence, the judge was right in determining that the plaintiff's claim was for all intents and purposes a claim for damages for constructive dismissal and nothing else. Accordingly the other heads of claims in the statement of claim have in our view, been directly or indirectly "subsumed" in, or "merged" with the constructive dismissal complaint.

G

H ***Fung Keong Rubber* – Damages At Common Law**

[41] We turn now to the claim at common law. In *Fung Keong Rubber* where Raja Azlan Shah (CJ Malaya) said at pp. 239 to 240 that it is futile for a dismissed employee to sue for wrongful dismissal at common law as the damages are restricted to the salary/wages equivalent to the contractual notice period:

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> In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, *eg*, a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the *damages are limited to the pay which would have been earned by the workman had the proper period of notice been given.* He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job immediately or during the notice period with some other employer.
>
> *He cannot sue for wounded feelings or loss of reputation caused by a summary dismissal,* where for instance he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, *viz*, an award of damages.
>
> Further, *the courts will not normally "reinstate" a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid:* see *Vine v. National Dock Labour Board* [1957] AC 488, 500, 507; *Francis v. Municipal Councillors of Kuala Lumpur* [1962] 1 WLR 1411; [1962] MLJ 407. At the most it will declare that it was wrongful.
>
> However his *common law right has been profoundably affected in this country by the system of industrial awards enacted in the Industrial Relations Act, 1967. The wrongfully dismissed workman can now look to the remedies provided by the arbitration system.* He can now look to the authorities or his union to prosecute the employer and force the latter to reinstate him. *Reinstatement, a statutorily recognised form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law.* (emphasis added)

[42] Thus, it is necessary to go back to the basic question – whether the plaintiff's claim for constructive dismissal, which ought to have been pursued *via* s. 20 of the Act, can be brought under a common law claim for substantial damages. The defendant's stand is that the plaintiff's claim predicated on constructive dismissal can only be pursued *via* s. 20 of the Act and Suit 694, which seeks RM96,032,856.40 as damages, is a manifestation of an abuse of process.

[43] We would answer the question in the following manner.

[44] The Industrial Court is a creature of the Act, which is in turn, a piece of social legislation, enacted as a speedy form of statutory remedy to resolve industrial disputes between employers and employees and trade unions.

[45] In our view, having regard to the purpose for which the Act was enacted, it was wholly incumbent upon the plaintiff, who complains that she had been constructively dismissed, to invoke the statutory remedy under the Act, instead of filing a civil action and claiming substantial damages of the type as stated in the statement of claim. The type of damages which are stated in the statement of claim cannot be awarded by the Industrial Court. As

stated in the earlier part of this judgment, the Industrial Court will only make an award as permitted by the Act – reinstatement (or salary *in lieu* of reinstatement) with back wages (per the Second Schedule). What the Industrial Court will award is compensation for loss of employment, and that is what the plaintiff will be entitled to, if at all.

[46] Whilst an employee may file a common law claim in the civil court, such a claim is confined, as a matter of law, to "meagre" damages in the form of salary *in lieu* of notice. (See: Federal Court in *Fung Keong Rubber*). The legal position in this regard was also reiterated by the Court of Appeal in *AETNA Universal Insurance Sdn Bhd v. Ooi Meng Sua* [2001] 3 CLJ 1; [2001] 3 MLJ 502 (CA) ("*AETNA*").

[47] Having regard to the principles of law adverted to earlier *vis-à-vis* the claim at common law, it is necessary to now examine the plaintiff's common law claim in Suit 694. In the present case, there is nothing which is due by the defendant to the plaintiff under the employment contract. Hence, even if the case proceeds to trial and the plaintiff succeeds in proving that she was constructively dismissed, she will not even be entitled to salary *in lieu* of notice, as that has already been paid.

[48] Counsel for the plaintiff said that it is the plaintiff's choice whether she wants to pursue a claim in the Industrial Court or to go to the civil court. That is true to an extent. But, if she decides not to go to the Industrial Court then she will have to accept the consequences of going to the civil court – "meagre" damages per *Fung Keong Rubber*. But here she maintains that she is entitled to the colossal damages as pleaded in the statement of claim (totalling RM96,032,956.40), which in our view, is not claimable as a matter of law. We would add that it does not follow that just because the plaintiff chose not to go the Industrial Court, that she is *ipso facto* entitled to pursue her claim as pleaded in the statement of claim.

[49] Consequently, if the plaintiff's claim is unmaintainable as a matter of law (which is the case here), then it is the bounden duty of the court to have the suit struck out on the basis that the claim has no prospect of success and is an abuse of the process of the court.

[50] Counsel for the plaintiff argued that if the plaintiff has a "better claim" than such a claim can be filed in the civil court. Counsel relied upon the Federal Court's decision in *Fung Keong Rubber*. He said that *Fung Keong Rubber* gives room for the possibility that the plaintiff's claim in its present form can be filed as an alternative to pursuing the statutory remedy per the Act. In our view, counsel's argument is predicated on a misreading of *Fung Keong Rubber*.

[51] In our view, *Fung Keong Rubber* extols the benefits of pursing the statutory remedy under the Act. Thus, the remedy for a dismissed employee like the plaintiff, lies in the statutory dispute resolution process as envisaged by s. 20(1) of the Act and thereafter to allow the statutory mechanism to take its course.

Wilkinson v. Barking Corporation

[52] Indeed, since Parliament has enacted the Act, it is relevant to ask whether a dismissed employee can choose to circumvent the statutory process by filing a civil claim on the argument that he/she can do so since the Act has not ousted the jurisdiction of the civil court? Of course, the Act does not say that the jurisdiction of the civil court has been ousted. But that does not mean that the statutory process under the Act can be avoided or disregarded.

[53] In our view, if Parliament (per the Act) has put in place a statutory mechanism/process and stipulates the remedies that can be given by the statutory tribunal, then that is the process/remedy that must be pursued. In this regard, the following passage from the English Court of Appeal's decision in *Wilkinson v. Barking Corporation* [1948] 1 KB 721 (CA) per Asquith LJ (pp. 724 to 725 KB) is relevant and instructive:

> It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others. As the House of Lords ruled in *Pasmore v. Oswaldtwistle U.D.C.* [1898] AC 387, 394 (per Lord Halsbury): "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.

[54] As stated in *Fung Keong Rubber*, whilst the civil court will not order specific performance of a contract of employment, the Industrial Court, has on the other hand, the power under the Act, to order, in an appropriate case, reinstatement plus back wages. Essentially, the remedy that is available *via* the statutory adjudication process is designed to compensate the dismissed employee for the loss of employment.

[55] For completeness, we should add that there are decisions of the High Court which have gone in different directions on the point as to whether a claim for wrongful dismissal can be pursued *via* the civil court.

Alan Thomas Bohlsen v. Draftworldwide Sdn Bhd

[56] In *Alan Thomas Bohlsen v. Draftworldwide Sdn Bhd* [2009] 1 LNS 550; [2009] 8 MLJ 461 (HC) ("*Bohlsen*") the High Court entertained a civil suit by an employee who claimed that he was "constructively dismissed" and granted damages equivalent to the income that he would have earned up to the date of his retirement.

[57] In the case of *Bohlsen*, the plaintiff/employee claimed for damages arising out of the defendant/employer's breach of the contract (*ie*, constructive dismissal), and the High Court allowed damages quantified by the plaintiff/employee and which was undisputed/unchallenged by the

A defendant/employer, for loss of agreed salary, loss of annual home leave allowance, loss of annual housing rental and loss of annual club membership and fees for the duration of the contract (instead of limited to salary *in lieu* of notice). The High Court allowed substantial damages on the basis that it would put the plaintiff/employee in the same position he was in if he had B not been constructively dismissed by the defendant.

[58] As far as we are concerned, the case of *Bohlsen* is contrary to the principle that was enunciated by the Federal Court in *Fung Keong Rubber* – only salary *in lieu* of notice is claimable at common law. It is important to note that the case of *Bohlsen* did not go on appeal to the Court of Appeal. And C it is of critical importance to note that *Fung Keong Rubber* (reported in 1981) and the Court of Appeal's decision in *AETNA* (reported in 2001) do not feature in the grounds of judgment. Therefore, it would seem that the argument based on "meagre damages" may not have been considered in the *Bohlsen* case.

D **[59]** Finally, we take the view that by allowing a claim based on "constructive dismissal" the High Court in *Bohlsen* had effectively "usurped" the statutory role, function and jurisdiction of the Industrial Court. For the reasons stated above, we doubt the correctness of the outcome in that case. We are impelled to the view that *Bohlsen* was wrongly decided.

E **[60]** Consequently, in the present case, if the plaintiff's claim, as pleaded, were allowed to go to trial, the High Court would for all intents and purposes be usurping the jurisdiction of the Industrial Court, which in our view, would be an abuse of the process of the court.

F ***Ng Siang Teik v. Chow Tat Ming***

[61] A case to the contrary is *Ng Siang Teik v. Chow Tat Ming & Ors* [2010] 1 LNS 1778; [2010] MLJU 1907 (HC) ("*Ng Siang Teik*") where the plaintiff filed a civil suit alleging among other things that there was a conspiracy to injure the plaintiff's livelihood when the defendants abused the disciplinary G proceedings to dismiss the plaintiff.

[62] There was a further claim of RM450,000 for loss of reputation of the plaintiff, a sum of RM450,000 for injured feelings, a sum of RM200,000 for the conspiracy as well as exemplary damages for loss of income of the plaintiff to be assessed. In striking out the suit, Harmindar Singh Dhaliwal H (JC) (as he then was now FCJ) applied *Fung Keong Rubber* and said relevantly:

> **Decision**
>
> It was clear from the way the claim was being pursued that the plaintiff I was claiming wrongful dismissal on the grounds that the defendants had conspired to dismiss the plaintiff by issuing a show cause letter which had no basis and which resulted in the dismissal of the plaintiff without any domestic inquiry being held. This action, it was contended, was in breach of Article 5 of the Federal Constitution and the rules of natural justice.

Now *if the plaintiff was seeking compensation or relief for wrongful or unjustified dismissal, he is obliged to seek his relief in the Industrial Court as his remedy is limited under Common Law* (see *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156; [1981] 1 MLJ 238 at 239).

In *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80; [1970] 2 MLJ 41, Gill FJ (as he then was) in the Federal Court cited with approval the case of *Wilkinson v. Barking Corporation* [1948] 1 KB 721 at 724 as follows:

> It is undoubtedly good law that where a statute creates a right and, in plain language, give a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others.

In similar vein, the Supreme Court of India in *Jitendra Nath Biswas v. M/S Empire of India and Ceylone Tea Co. & Anor* [1990] 1 ILR 141 stated at 145:

> It is therefore clear the scheme of the Industrial Disputes Act clearly excludes the jurisdiction of the civil court by implication in respect of remedies which are available under this Act and for which a complete procedure and machinery has been provided in this Act.
>
> For these reasons, *the plaintiff's claim for injury to reputation, for injury to emotion, physiology, integrity of the plaintiff, damages for conspiracy and damages for loss of earnings is frivolous and vexatious as the High Court has no powers to award the same.*
>
> In any event, *the plaintiff has disingenuously attempted to merge the claim for wrongful dismissal with the tort of conspiracy as well as the tort of defamation.* The tort of conspiracy is a tort by itself and is separate and distinct from the tort of defamation or the claim for wrongful dismissal. ...". "... In any case, it is patently obvious that the claim for conspiracy cannot stand on its own as the *damages being claimed are in essence losses as a result of wrongful dismissal and loss of reputation.* This is clear evidence that the conspiracy claim has merged with the other claims. As such, this claim is not actionable (see *Ward v. Lewis* [1955] 1 All ER 55; *Mrs Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors* [1978] 2 MLJ 123; *Mrs Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors* [1979] 1 MLJ 71 and *Dato' Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Ors (No. 2)* [2005] 3 CLJ 493). (emphasis added)

Ng Kim Fong v. Menang Corporation

[63] Before we conclude, we feel compelled to deal with the decision by this court in *Ng Kim Fong v. Menang Corporation (M) Bhd* [2020] 1 LNS 1263; [2020] MLJU 644; [2020] 5 MLRA 350 (CA) ("*Ng Kim Fong*"). In *Ng Kim Fong*, the appeal was allowed and the Court of Appeal allowed the claim based on appellant's retirement benefits as per her contract of employment. In that case, the Court of Appeal made it clear that the amount that was

awarded was "not compensation for loss of employment". The Court of Appeal was mindful of the legal position per *Fung Keong Rubber* and *AETNA* and allowed only the "contractual" claim for retirement benefits.

[64] It is important to note that in the *Ng Kim Fong* case, the appellant was due to retire in a few months when she was "ambushed" at a meeting and "forced" by the managing director to resign and thereby compelled to give up her retirement benefits after having worked for 27 years and five months. The appellant's forced resignation took place on 19 July 2016 whereas she would have reached her 55th birthday on 7 September 2016 and taken her retirement benefits. Based on the Minimum Retirement Age Act 2012, she could have (if she wanted to) worked until her 60th birthday. Obviously, if she retired at the age of 60, her retirement benefits would have been much higher than if she had retired at the age of 55 years.

[65] The Court of Appeal made a finding that, but for the forced resignation, she would have reached her retirement age and received her retirement benefits accordingly. The relevant paragraphs from the Court of Appeal's grounds of judgment read as follows:

> [175] We must go on record as stating that the factual situation here is quite unique. Thus, but for the events which took place on 19th July 2016, the appellant would have worked until her 60th birthday and thereby entitling her to her full retirement benefits as per her contract of employment.
>
> [176] Accordingly, we do not see any legal (statutory) or equitable impediment or restriction on this Court granting the appellant relief by way of her retirement benefits which she was contractually entitled to in the ordinary course of events.
>
> **Outcome**
>
> [177] In the circumstances, we find that the appellant is entitled in law to **damages for breach of contract, not as compensation for loss of employment,** but in the form of **payment of her contractual retirement benefits** as provided in clause 25.3(c) of the Staff Employment Policy - Terms of Service, **calculated up to retirement age by law; that is, 60 years,** 1.5 months x 17 years x RM10,850 = **RM276,675.00.** That sum shall carry interest at 5% per annum from 1st August, 2016 till the date of full payment or realisation. (emphasis added)

[66] For completeness, we should mention that the Federal Court per Federal Court Civil Application No: 08(f)-67-02-2020(W) dismissed the employer's leave application. In any event, there are, in our view, no parallels between the *Ng Kim Fong* case and the present case under appeal. The present case is one where the plaintiff chose not to go to the Industrial Court as she was advised that she had a "better claim" which she could pursue in the civil court.

[67] In our view, on the facts of the present case, the only claim which the plaintiff had was a claim based on a complaint that she was (allegedly) constructively dismissed which ought to have been taken up under s. 20(1) of the Act and assuming the plaintiff succeeds in establishing that she was indeed dismissed without just cause or excuse, to then let the Industrial Court decide on the appropriate remedies as the case may be.

[68] For the reasons as stated above, we are of the view that the plaintiff's claim, per Suit 694, is a clear manifestation of an abuse of process. As a matter of principle, if the claim is one for compensation for wrongful dismissal (loss of employment) then it is a claim which ought to be ventilated *via* the statutory dispute mechanism *ie*, Industrial Court and not the civil court.

[69] In the final analysis, we agree with and endorse the approach taken by the High Court in *Ng Siang Teik* – a civil suit by a dismissed employee who chooses not to pursue the statutory dispute resolution mechanism/process under the Act and/or seek the requisite statutory remedy under the Act and who seeks instead monetary compensation for loss of employment *via* a common law action ought to be struck out as being an abuse of process of the court.

Outcome

[70] For the reasons stated above, the defendant's appeal is allowed and the decision of the High Court dated 16 March 2022 dismissing encl. 9 is set aside. We make a consequential order to allow encl. 9 and the writ and statement of claim dated 26 October 2021 are hereby struck out and dismissed. We ordered costs of RM8,000 as costs here and below (subject to allocator).